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Supreme Court of the United States

October Term, 1975

No. 75-973

UNITED TRANSPORTATION UNION LODGE NUMBER 550, an unincorporated association, and UNITED TRANSPORTATION UNION, an unincorportated association,

Petitioners

V.

ROBERT ROCK, EZELL B. JOHNSON, RUSSELL C. WALKER, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED TRANSPORTATION UNION LOCAL NUMBER 974, an unincorporated association,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
October Term 1975

No. _____

UNITED TRANSPORTATION UNION
LODGE NUMBER 550, an unincorporated
association,

and

UNITED TRANSPORTATION UNION,
an unincorporated association,

Petitioners

v.

ROBERT ROCK, EZELL B. JOHNSON,
and RUSSELL C. WALKER, each
individually and on behalf of all others
similarly situated

and

UNITED TRANSPORTATION UNION LOCAL
NUMBER 974, an unincorporated association,

Respondents

PETITION FOR WRIT OF CERTIORARI FROM
THE FOURTH CIRCUIT COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, United Transportation Union Lodge Number 550 and United Transportation Union, hereby petition for a Writ of Certiorari to review the decision of the Fourth Circuit Court of Appeals made on September 22, 1975.

OPINIONS BELOW

The District Court's original decree, dated April 28, 1972, which was never officially reported, is attached hereto in the appendix. The first decision of the Fourth Circuit Court of Appeals (473 F. 2d 1344 [4th Cir.], cert. denied, 412 U. S. 993 [1973]) is also attached hereto in the appendix.

The remand opinion of the District Court, dated May 17, 1974, which was never officially reported, is attached hereto in the appendix. The second opinion of the Fourth Circuit Court of Appeals, _____ F. 2d _____, is also attached hereto in the appendix, and is the decision for which review is sought.

JURISDICTION

The judgment sought to be reviewed was made by the Fourth Circuit Court of Appeals on September 22, 1975. A petition for rehearing was filed on October 6, 1975, and was denied by two of the three Judges on December 1, 1975, a copy of which order is in the appendix attached hereto. There was no extension granted to file this Petition for Certiorari. On or about

December 11, 1975, the Fourth Circuit Court of Appeals stayed its mandate to permit petitioners to file application for a Writ of Certiorari. The statutory provision believed to confer jurisdiction on the Court to review the judgment in question is 28 U. S. C. A. §1254 (1). The District Court had jurisdiction pursuant to the provisions of 42 U. S. C. A. 2000e - et seq., commonly known as Title VII of the Civil Rights Act.

ISSUES

Issue Number One. Has the Court of Appeals violated traditional notions of appellate review and the recent directives of the United States Supreme Court by ignoring or changing the District Court's findings of fact?

Issue Number Two. Is there a conflict within the Fourth Circuit and among other circuits with regard to the nationally important issue of seniority rights, i.e., can the remedy fashioned by the Court to correct past discrimination be in itself discriminatory and contrary to previously guaranteed contractual rights?

STATUTE INVOLVED

The Statute involved is the equal employment opportunity chapter of the Civil Rights Act found in 42 U. S. C. A. 2000e-et seq. The provisions of the chapter that are directly involved include:

1. 42 U. S. C. A. 2000e-2

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin;

or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin . . .

(c) It shall be un unlawful employment practice for a labor organization

(1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color,

religion, sex or national origin;

(2) to limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of section . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to

differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206 (d) of Title 29.

2. 42 U. S. C. A. 2000e-5 (g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account

of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

A. Statement of Material Proceedings.

On June 2, 1969, plaintiffs filed a complaint in the United States District Court for the Eastern District of Virginia, Norfolk Division, against the Norfolk and Western Railway Company, alleging violation of the Equal Employment Opportunity provisions contained in Title VII of the Civil Rights Act of 1964 (42 U. S. C. A. §2000e). On December 20, 1969, the plaintiffs, including Russell C. Walker, filed an amended complaint making the same allegations against N & W, and joining the United Transportation Union (UTU) and Lodge 550.

Defendants N & W, UTU and Lodge 550 filed answers to the amended complaint denying the plaintiffs' substantive allegations generally. By order of the District Court on November 6, 1970, the class was defined to include "any Negro employee of the Norfolk and Western Terminal who finds himself discriminated against."

The action came on for trial, which lasted four days, and on January 20, 1972 the District Court handed down its Memorandum Opinion, which outlined the Court's views and directed the parties to submit proposals which the Court would then use in formulating its decree. Sustaining certain of plaintiffs' allegations of discrimination and rejecting others,

the Court called for the adoption of a "topping and bottoming" type plan for rearrangement of the existing seniority system to go with provisions to encourage blacks to advance. The Court found post-1965 discrimination with respect to the N & W hiring practices, and ordered injunctive relief. The Court further found that maintenance by the UTU of segregated local lodges was discriminatory, and ordered their merger to a single lodge. The Court denied plaintiffs' claim for back pay, but awarded the plaintiffs attorneys' fees based on the relief granted. The final decree was entered by the Court on April 28, 1972, and plaintiffs filed a notice of appeal.

On February 20, 1973 the Court of Appeals handed down its opinion on the first appeal of this case (473 F. 2d 1344[4th Cir.], cert. denied, 412 U. S. 993 [1973]). The Court of Appeals found that the defendants had violated the Act and affirmed the finding of the District Court in that respect. As to the N & W, the Court of Appeals stated: "As a result of the employment practices followed by the defendant railroad, prior to 1965, the two yards were racially identifiable," and further ruled that "the findings by the District Court that, in its hiring practices, the defendants had violated the Act . . . is not clearly erroneous and is accordingly affirmed." Further, the Court of Appeals found that since ". . . District Court was clearly right in ordering a merger of the local unions covering the employees in the two yards . . . its action in this respect is affirmed." The Court further concluded that the issue on appeal revolved about the manner in which, accepting a finding of a violation of the Act, the seniority rosters of the two yards should

be merged. In response, the Court of Appeals found that a "dovetailing" merger plan was an appropriate remedy under the circumstances of the case. In discussing such a merger, the Court stated that:

> "A single terminal seniority roster should necessarily provide for the preservation of the rights of all incumbent employees at both yards, and would permit no displacement of incumbent employees. It would be limited in operation to bidding for future vacancies in either yard, and, as plaintiffs concede, would remain subject to the overriding considerations of basic job competency. With particular reference to the right of Barney Yard brakemen to qualify for promotion to conductors, any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this higher classification, not give such brakemen any higher or broader rights than those enjoyed or granted to CT Yard brakemen, who had qualified for promotion to conductor." (Emphasis supplied). (A-52, this appendix).

Further, the Court of Appeals remanded the matter of the right of the plaintiffs to back pay, since it concluded that the plaintiffs were entitled to a more liberal form of merger, and ordered the District Court to make specific findings on the conflicting claims of the parties

on that issue. Also, the matter of attorneys' fees was remanded for further proceedings in the District Court.

After the Court of Appeals' initial decision, the UTU filed a Petition for a Writ of Certiorari to this Court and raised two issues: (1) Does the "dovetailing" remedy as ordered by the Courth Circuit Court of Appeals conflict with similar remedies involving substantially the same facts in other courts of appeal? and (2) Does Title VII of the Civil Rights Act permit the displacement of existing employees in granting remedial relief?

On June 4, 1973 this Court denied the Petition for a Writ of Certiorari and the case was remanded from the Court of Appeals to the District Court.

On October 4, 1973 the District Court conducted a day-long remand trial (A-II, 50-323), and after receiving post-trial briefs and hearing oral argument, the District Court issued its Opinion and Order on May 17, 1974 (A-56, this appendix).

The District Court's order provided for a dovetailing of the seniority rosters based on date of hire for brakemen, date of promotion for conductors and date of promotion for car retarder operators, which is consistent with the manner in which those respective seniority rosters are made up in the first place.

The Court, in its discretion, refused to order back pay to plaintiff class. In doing so, the Court relied on (a) its finding that the yards

themselves had not been ordered merged, and its finding that, while progression may be slower in one yard than another, it is a function of the nature of the work and not a result of the racial characteristics of those laboring therein. The Court further found that (b) the N & W made a bona fide offer to dovetail the rosters in 1968, and the plaintiff class refused such offer, not wanting to voluntarily chance a loss of seniority by any dovetailing. Further, the Court found that (c) the economic disparities reflected in the exhibits introduced by the plaintiffs at the remand hearing were products of economic factors, such as the lack of coal exports, which shut down employment and slowed down promotions, and were not the products of racial prejudice. The reasons, then, for slower promotion rates for Barney Yard men as alleged by the plaintiffs are pure speculation. Finally, the Court found (d) that the two racially identifiable yards were a result of the nepotistic hiring practices of the N & W, and that such hiring practices were the result of hiring by word of mouth from family to family and from friend to friend. Such nepotistic hiring was found to be not so legally sinful as it was a source of abrasion which would be stopped by merger of the rosters.

The Court also rejected the plaintiffs' request for an upward adjustment of their monthly guarantees under the Nickel Plate Merger Plan, since this matter had never been mentioned until February 1974 in final argument of this case on remand.

The parties having agreed on the matter of attorneys' fees, that issue was resolved.

The plaintiffs appealed a second time to the Fourth Circuit Court of Appeals on May 29, 1974, challenging the District Court's denial of back pay, the merger of the conductors' seniority rosters on the basis of date of promotion to conductor, and the refusal of the District Court to give effect to the Nickel Plate Merger Agreement, which was raised for the first time on oral agrument at the conclusion of the case on remand.

The Fourth Circuit Court of Appeals, in its decision handed down September 22, 1975, remanded the case once again to the District Court with instructions to (1) award back pay against the N & W and to decide whether the Unions should share in payment of the back pay award (2) to merge the conductor seniority rosters, not on date of promotion to conductor, but on date of hire with the company, and (3) to consider the Nickel Plate Merger Agreement in the back pay award. (A-84, this appendix). The Court of Appeals then denied both defendants' Petitions for Rehearing. (A-117).

From this decision of the Fourth Circuit Court of Appeals, the UTU seeks the review of this Court.

Robert Rock, Ezell B. Johnson and Russell C. Walker and Local 974 of the United Transportation Union shall hereinafter be referred to as the "plaintiffs;" defendant Norfolk and Western Railway Company shall be hereinafter referred to as the "N & W;" United Transportation Union and Lodge Number 550 shall hereinafter be referred to as "UTU" and "Local 550." All page references will be made

to the printed record used in the Court of Appeals, except where reference is made to the appendix in this Petition. Page references preceded by "A-I" are from the appendix from the first appeal, and those preceded by "A-II" are from the appendix from the second appeal; references to "A - " are to the appendix in this petition.

B. History of the Case as it Relates to Back Pay.

When questioned in the first trial about particular incidents of hiring discrimination, Larry W. Walker (A-I, 147a), George Hines (A-I, 192a), Maurice T. Haynes (A-I, 221a), and M. N. Harris (A-I, 258a) testified that they applied for jobs because friends and relatives working in the Barney Yard informed them that the N & W was hiring on the Barney Yard. Thus, members of the plaintiff class, had, by the plaintiffs' own evidence, and independent of any acts of the UTU and Local 550, perpetuated the hiring of blacks in the Barney Yard by simple word of mouth. For example, C. A. Glass states:

> "Generally the railroad is . . . a friend to friend affair. I imagine that I will draw at least 50 percent of applicants from relatives or friends of now present employees. They will bring them up or call me up and ask me if I am hiring, things of that nature." (T-511)

The record is void of any evidence that the defendants UTU and Local 550 had any

authority in hiring, or that they interferred in any way with the hiring or other personnel policies of the N & W. In its findings of fact (A-12), the District Court accepted the fact that the racial make-ups of the two yards came about as a result of the nepotistic hiring practices of the N & W, and that such hiring practices continue in the new hires the racial identity of the two yards.

The evidence sustains the finding by the District Court that the UTU maintained segregated locals and as a result of the first trial of this case and of the District Court's order thereupon, Local 974 and Local 550 were merged into Local 48. Contrary to the plaintiffs' allegation in their complaint that the UTU maintained segregated locals which deprived Negro employees of employment opportunities (A-I, 88a), the evidence showed that the place where a man worked -- Barney Yard or CT Yard -- determined the lodge that he belonged to, but the converse did not apply, and the individual's race or color was not a factor (A-I, 296a). In other words, the individual was hired and placed in a particular yard, and as a result of that placement he became a member of either Local 974 or Local 550 after he had become an employee in his particular yard. The admitted segregated locals, which were long ago corrected pursuant to the District Court's order, had nothing whatsoever to do with promotional opportunities or employment opportunities. The District Court did not so find, the plaintiffs have not so argued, and the Court of Appeals has not so found.

The Court of Appeals, in the first appeal, upheld the above findings of fact of the

District Court, and said:

> "The findings by the District Court that, in its hiring practices the defendants have violated the Act . . . is not clearly erroneous and is accordingly affirmed." 473 F. 2d 1344 (A-47,48)

At the conclusion of the remand of this case, the District Court found as a matter of fact that the N & W made a bona fide offer to dovetail the rosters in 1968, and "this was communicated to the Unions. The proposition was turned down by the Unions," and "in 1968, they, as rank and file members, simply did not want to voluntarily chance a loss of seniority by any dovetailing of rosters, and they ought not to be allowed back pay now for something they opposed then." (A-63)

Despite that finding, the Court of Appeals spent a good portion of its opinion arguing with the District Court's findings of fact and remanded as against the Unions to determine whether they combined with N & W to deprive black employees of income opportunities. (A-95)

C. Statistical Facts.

Plaintiffs rely on statistical evidence to bolster their argument as to furloughs and loss of work. However, plaintiffs, by their own testimony, have stated that their seniority in the Barney Yard is good assurance against being furloughed. Robert Rock, a plaintiff in this suit, who has been employed in the Barney Yard since 1947, stated that he could not recall ever

being unable to work at all in the course of a week (A-I, 98a). Barney Yard employee, George Hines, stated that he had not been furloughed since 1964 (A-1, 200a). Further, M. P. Hanyes, a Barney Yard employee, testified that he had worked regularly, and that when he did work he often worked a total of 16 hours in a 24-hour period (A-I, 232a; A-I, 248a).

The evidence set forth in the case has shown that the availability of coal is beyond the control of all defendants. The resulting lack of work from the aforementioned shortage of coal affects all Barney Yard employees equally, both black and white, whether they are brakemen, conductors or car retarder operators (A-I, 547 a through 551a). The CT Yard furlough system is the same as the system used in the Barney Yard (A-I, 466a, 467a, 502a, 503a). In other words, if the availability of coal is up, and the availability of other cargo is down, there is a resulting lack of work in the CT Yard (A-I,548a through 562a). As a result, it appears that coal shortages in the past have contributed to the plaintiffs' statistical averages, despite the fact that plaintiffs relate all differences to a racially motivated discriminatory furlough system.

The District Court found that during the pertinent period there were approximately 145 Barney Yard men and approximately 350 CT Yard employees (A-I, 33a). The Court further found that such figures "provided the Railroad with a black and white work force in about equal percentage to the surrounding population . . . " and that the percentage would meet the requirements of the Civil Rights Act, but for

the segregation into two yards (A-12).

D. Merger of Conductors' Roster.

The progression of the job titles in the Barney Yard and the CT Yard is exactly the same: brakeman is the entry-level job, conductor is the second-level job, and car retarder operator is the highest-level job. Each position in the Barney Yard has the same pay as the corresponding position in the CT Yard (A-I, 28a; A-I, 500a through 538a).

The N & W normally attempts to hold promotions to conductor to those employees who have five years experience or more, as dictated by the demand for conductors (A-I, 459a). The primary reason for the desire to have a man with five years experience prior to his promotion to conductor is that on-the-job training is of great importance (A-I, 460a). The N & W determines the need for conductors and all brakemen are eligible for promotion to conductor, provided they have experience and pass the conductors' exam administered by the Company (A-I, 459a). Every man on the conductors' roster has passed the conductors' exam. A brakeman's seniority on the conductors' roster is determined by the date that he passed the exam. The conductors' exam is prepared, administered and graded by the N & W, without interference by the Union (A-I, 459a). A brakeman's seniority on the brakemen's roster is determined by the date that he is hired at this entry-level job. Conductors' and car retarder operators' seniority dates are based on the day of promotion to conductor or car retarder operator,

as the case may be.

For a history of the status of Barney Yard and CT Yard conductors' rosters, we refer to A-I, 53a, wherein the United States v. C & O decree was mistakenly inserted in the first appendix on appeal, and also page A-I, 69a (A-22), which is the decree in the Rock case as entered by Judge MacKenzie on April 28, 1972. In both instances, the decree provided, with respect to merging the rosters, that Barney Yard brakemen could be promoted to Yard Conductor after they had worked at least two years in the Barney Yard, had at least 80 hours on-the-job training in the CT Yard, and had passed the yard conductors' exam. They further provided that Barney Yard brakemen promoted to Yard Conductors should establish a seniority date on the yard conductors' roster on the date that they passed the yard conductors' exam. Both decrees state:

> "If two or more Barney Yard brakemen or Yard brakemen pass the yard conductors' test on the same day, they shall establish seniority on the yard conductors' roster in the order of their company seniority date." (Emphasis supplied).

The foregoing provision, used in both decrees, was a tie-breaker provision, and was the first usage of date of hire as a determining factor in establishing seniority dates on the conductors' roster.

The plaintiffs proposed that the brake-

men's roster be dovetailed on the basis of date of hire, that the conductors' roster be merged on the date of hire, and that the car retarder operators' roster be merged on the date of promotion to car retarder operator. After the remand trial, the defendant Union proposed that the merger of the conductors' rosters provide that:

> "Any conductor who is not qualified in a particular yard shall be permitted to qualify within 180 days. Upon qualifying, the roster shall so indicate. A conductor who fails to qualify within a period of 180 days, but who later qualifies, shall acquire conductors' seniority in the yard in which he is not qualified as of the date that he qualifies; provided, however, that nothing in this decree shall require an employee to qualify for a conductor's position."

By this proposal, a conductor is allowed to qualify in both yards, thus preserving his rights to available jobs on either yard, but no conductor is threatened with the loss of his seniority date by comparing his hiring date with another conductor's hiring date.

However, the Fourth Circuit Court of Appeals, on the second appeal, remanded the case for dovetailing of conductors' rosters on the basis of date of hire. This was done in spite of the earlier directive of a different panel of the Court of Appeals not to give Barney Yard brakemen "any higher or broader rights than those enjoyed or granted to CT Yard brakemen

who had qualified for promotion to conductors." 473 F. 2d at 1349 (A-52).

E. Nickel Plate Merger.

The plaintiffs raised the facts of the Nickel Plate Merger for the first time at the remand trial. There is no copy of the Nickel Plate Merger introduced in evidence, and there is no evidence on the subject other than the testimony of Mr. Malloy, who is a vice president in labor relations with the N & W. Mr. Malloy's job is to pay wage claims under the protective plan known as the Nickel Plate Merger Agreement, wherein yard men submit a claim form showing their protected wage level and their actual earnings for a period of a month and assert that they were available for more work had it been available. The amount consequently due the worker (the difference between a guaranteed wage and his actual earnings) is paid by the N & W pursuant to the Nickel Plate Merger Agreement.

Barney Yard employees are protected under the Nickel Plate Merger Agreement, and their wages are guaranteed in the same manner as the CT Yard men.

The District Court would not consider this agreement because of its lateness and the circumstances under which it was brought to the Court's attention. The Court of Appeals, however, directed the District Court on remand to consider the Nickel Plate Agreement unless it concludes that the tardiness of this issue prejudices the defendants.

REASONS FOR GRANTING WRIT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING BACK PAY TO THE PLAINTIFF CLASS.

A. THE DISTRICT COURT DID NOT FIND THE N & W SENIORITY SYSTEM UNLAWFUL.

In order to advance their position in favor of back pay, the plaintiffs argue that the Court's finding that there was nepotistic hiring by the N & W should be expanded to read that the seniority system and the operation of separate yards were likewise discriminatory. However, the District Court has not so found, and it is submitted that the Court of Appeals, in remanding this case the first time, did so for the purpose of dovetailing the rosters, and a reconsideration of back pay, and that Court did not order the Trial Court make a finding of discrimination in the seniority system and thereby award back pay.

The District Court has the authority under 42 U. S. C. A. §2000e-5(b) to shape affirmative relief in civil rights cases "with or without back pay." The plaintiffs relied on Moody v. Albemarle Paper Company, 474 F. 2d 134 (4th Cir. 1973) (prior to this Court's reconsideration of Moody) for their proposition that "the exercise of discretion must serve the remedial purposes of Title VII and conform to standards announced by the appellate courts, including this Court." In Moody, the Court found a discriminatory seniority system, a finding that is absent in the instant case through two trials at the District

Court level and two appeals to the Court of Appeals. Here, the District Court has found that the N & W was guilty of nepotistic hiring, and that no individual employee has proved that he was discriminated against on a personal basis insofar as hiring or seniority is concerned. The Court of Appeals did not overrule the Trial Court finding that the nepotistic hiring by the N & W was a violation, and said in 473 F. 2d 1348: "The findings by the District Court that, in its hiring practices, the defendants had violated the Act. . . is not clearly erroneous and is accordingly affirmed."

The plaintiffs also rely heavily on Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971) in their contention that back pay is required once the Court has found a violation of the Act. It is submitted that the Court of Appeals considered Robinson v. Lorillard in remanding this case after the first appeal, since that case was cited in the opinion, and despite that consideration, did not order the District Court to award back pay. The Court of Appeals merely stated that the District Court "should make specific findings on the conflicting claims of the parties on this issue."

The plaintiffs would lay down a hard and fast rule with regard to the allowance of back pay. The District Court has, in its discretion, chosen not to follow a rigid rule. This Court has defined discretion as :

> "The term 'discretion' denotes the absence of a hard and fast rule . . . . When invoked as a guide to judicial action it means

> a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of a judge to a just result." Langnes v. Green, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 520 (1931).

See also LeBlanc v. Southern Bell Tel. & Tel., 460 F. 2d 1228, 1229 (5th Cir. 1972) and Banks v. Seaboard, 360 F. Supp. 1372, where no back pay was awarded absent evidence that the seniority system apprenticeship or training requirement for car inspector examination were racially motivated. Furthermore, Robinson v. Lorillard is different in its facts from the instant case since it involved black jobs that were consistently lower paying and less desirable than those jobs awarded to whites.

The District Court's decree held that:

> "The yards have not been ordered merged. Progression may be slower in one yard than another, but this is the nature of the work of the yard, not the racial characteristics of those laboring therein." (A-63).

Thus, the District Court has not found racial discrimination in job classification, but in nepotistic hiring, and this is a special circumstance that is within the province of the Court to recognize.

Another special circumstance to justify no imposition of back pay is that the plaintiffs, despite a barrage of statistical data, are unable to prove that the disparities in wages that they decry are not as much a factor of economics as opposed to deliberate racial discrimination. Evidence has been introduced in a likewise voluminous manner that decreases in coal availability have in the past decreased the employment opportunities in the Barney Yard, and that on the other occasions the Barney Yard has had greater work opportunities than the CT Yard (A-I, 548a through 562a).

The District Court also accepted as proved that the N & W made a bona fide proposal in 1968 to merge the rosters, and the Court found that this proposal was communicated to the Unions and turned down (A-II, 24) (A-63). A letter from J. T. Jennings, Secretary-Treasurer of Local 550, which was introduced into evidence, stated that the Lodge had voted to table discussion of merger of seniority rosters pending merger of the seniority rosters between Norfolk and Western and the Virginian employees. The letter further went on to state that Local 974 "requests that the men on the Barney Yard be included in any and all merging of seniority rosters on the Norfolk Terminal" (A-I, 924a). The BRT (now UTU) did attempt to assist the Barney Yard officers in their quest for a merger of seniority rosters, but the Barney Yard officers stated that they were not able to make any acceptance on their own, and would have to take the matter back to the membership for further advice (A-I, 686a, 695a-698a).

At a conference held October 2, 1967 to discuss items in a certain request letter (N & W Exhibits 18 and 19, First Trial, A-I, 933a, 940a), which was attended by UTU General Chairman M. Y. Lusk, M. E. Peanort, Secretary-Treasurer of Local 974, and Robert Rock, the Local Chairman of 974, Lusk stated that the letter was not a request that any rosters be merged at that time, but only a request that the Barney Yard be included in any such merger if the rosters of former Virginian trainmen and N & W trainmen at the Norfolk Terminal were ever merged. M. E. Peanort, in writing Robert Rock, a plaintiff in this action, concurred with Mr. Lusk's statement (N & W Exhibit 18, First Trial, A-I, 933a).

Such a concurrence by Rock and Peanort was again evidenced at a meeting on October 19, 1967 (N & W Exhibit 19, First Trial, A-I, 940a).

These statements were made to the N & W by Mr. Lusk, representing the UTU and as lawful bargaining agent for Local 974, and the concurrence in the statement that the request for merger was not official by officers of Local 974 is evidence that the plaintiffs cannot rise above in this case. From October 17, 1967 until the filing of this law suit on June 2, 1969, no further request was made to merge the seniority rosters by Local 974 (A-I, 577a, 628a), despite the fact that there were conferences concerning seniority roster mergers which involved Mr. Rock, Mr. Peanort and Mr. Haynes, members and officers of Local 974, which conferences were held as late as November and December 1968 (A-I, 757a through 767a; Tr. 886-894).

In 1968, the same year that plaintiffs claim they had no knowledge of an offer by N & W to merge the rosters, a referendum was conducted by officials of Local 974 to determine the feeling of its members as to merging the seniority rosters. Of 128 ballots mailed to members, the following results were returned: 21 for dovetailing, 12 for topping and bottoming, 7 against any form of merger. Eighty-eight did not bother to reply (A-I, 241a through 243a).

The foregoing matters were available to the District Court in determining that there were special circumstances that would justify the Court in refusing back pay to the plaintiff class. Nepotistic hiring is not the type of conduct that would create disparity in wages. Even if the Barney Yard was comprised of a perfect ratio of white to black, as opposed to the population of the Tidewater area, and the economic factors that have influenced the Norfolk and Western Terminal in Norfolk were present as they have been in the past, any resulting disparity in wages earned by Barney Yard workers as opposed to CT Yard workers would not be an indicia of racial discrimination, but a product of economics.

It is submitted that the statistical evidence relied upon by plaintiffs does not take into consideration the amount of work available versus the amount of people available to do the work. As noted earlier, the Barney Yard was comprised of about 145 workers as opposed to 350 in the CT Yard (A-I, 33a). If the N & W had truly discriminated in holding down black hirings, the Barney Yard would have had a smaller total work force. The smaller work force, while representing a lower percentage of blacks than

found in the community, would have more work available to it during times of slack, and there would be fewer furloughs. The Barney Yardmen would then make a higher per man income, and statistics would so reflect. Thus, as another speculative nature of the statistics involved, it appears that no consideration has been given to the fact that there may be too many Barney Yard employees for the work that is available, yet the plaintiffs complain vehemently that the average Barney Yard income is less than the average CT Yard income. Mr. Timothy Malloy, Vice President, Labor Relations, for the N & W, testified in the remand trial regarding payments made under the Nickel Plate Merger Agreement, and on cross examination by the plaintiffs' counsel, he described his impression of the differences between Barney Yard and CT Yard earnings and the factors that control differences in earnings:

> "Work habits, availability of work. Some men are more aggressive when they are young, and do not have responsibilities at home as they do when they get older, their responsibility lessens, and they work less." (A-II, 244).

The foregoing is the testimony of a man who works in labor relations, and who specializes in computing employees' earnings on the N & W. A review of the N & W brakeman rosters for the Barney Yard and CT Yard in 1971 (A-I, 832a, 836a) shows that, while the average Barney Yard date of seniority is 1958, and the average CT Yard date of seniority is 1960, the median for the

Barney Yard is 1957 and the median for the CT Yard is 1962. The Barney Yard, then, is comprised of a generally older work force, and when taken with the testimony above, it appears that the plaintiffs' statistics do not reveal the entire picture, and the speculative nature of plaintiffs' statistics is evident.

Under cross examination, the plaintiffs' statistical witness admitted that there were numerous examples of Barney Yard men out-earning CT Yard men (A-II, 290-297). N & W's Exhibits 2 and 3 (A-II, 441-455) show that there are numerous examples of Barney Yard men out-earning CT Yard men of equal or greater seniority. Plaintiffs' counsel stated that: "We don't doubt that these are accurate summaries of what they purport to summarize, and as summaries of some of the information contained in our exhibits we don't contest that they are accurate" (A-II, 305).

B. THE DEFENDANT UNION IS NOT LIABLE FOR BACK PAY.

Even if there is an award of back pay, the record will not support a finding that the Union defendants are responsible for the payment of any part of the back pay award. The District Court found at the conclusion of the first trial of this case that:

> "Yard conductors, assistant trainmasters, and trainmasters are recruited by Norfolk and Western from the CT Yard force. Barney Yard brakemen, conceding that this training and work experience

> does not presently qualify them for such promotions, are therefore effectively blocked in their efforts to move ahead. To this extent they are 'locked in' to the three grades of brakeman, foreman and car retarder operator." (A-20).

After the remand hearing, the District Court found, in its Opinion and Order dated May 17, 1974, that:

> "Our reference in the prior opinion to employees of the Barney Yard being 'locked in' to a degree, only spoke of promotion to assistant yardmaster and yardmaster. The reference there had nothing to do with progression within the three grades of the yards themselves. Since our view of the evidence indicates only three yardmasters in twenty-five (25) years, this could hardly be urged to award back pay." (A-64).

Thus, the District Court's only finding of fact as to discrimination by the N & W was that the N & W was guilty of nepotistic hiring (A-19). That finding was affirmed by the Court of Appeals in its opinion, which stated:

> "The findings by the District Court that, in its hiring practices the defendants had violated the Act . . . is not clearly erroneous and is accordingly affirmed." 473 F. 2d 1344 (A-47, 48).

On the other hand, the District Court found that the Union was guilty of discrimination in violation of Title VII of the Civil Rights Act of 1964 by maintaining separate UTU locals, and the District Court ordered a plan for the merger of the two locals. That plan was adopted immediately after the District Court's first decree, and the two locals have long been merged into Local 48, and now function according to the Court's decree (A-19).

The outcome of this case is similar to U.S. v. Jacksonville Terminal Company, 451 F. 2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972), wherein the Court found that failure to consolidate locals violated the Act, and the proper remedy was for a reasonable consolidation procedure which would provide for the equitable representation of all Union members. There, as in the instant case, the order as to the Union was only for the merger of the separate locals, and there was no order for back pay.

It should be noted that running through the entire proceedings of this case, including the District Court's original order, the Fourth Circuit's decree, the District Court's order on remand, and the Court of Appeals' second opinion, the Union has never been found to be guilty of any discrimination or discriminatory employment employment practices except for the maintenance of separate locals. The District Court, in its remand opinion, made no findings as against the Union, thereby not disturbing the earlier findings of the District Court and the Fourth Circuit as to the Union's culpability in this case.

The maintenance of separate locals had nothing to do with a man's hiring, promotional opportunities, furloughs, overtime work, etc., nor does it have anything to do with the existing seniority system. The evidence disclosed that the place where a man was hired (Barney Yard or CT Yard) determined the lodge to which he belonged, but the converse did not apply, and the individual's race or color was not a factor (A-I, 296a). The most convincing proof that the separate UTU locals bear no relation to hiring, promotional and furlough discrimination that the plaintiffs allege is found in the fact that the locals have been merged for two years. Local 48, the new merged local, has been operating since the District Court's first order. Despite that fact, the plaintiffs argue, up to the present, that they are still being discriminated against in their employment. If they are, the blame cannot be laid upon the Union's maintenance of racially separate locals.

C. THE FOURTH CIRCUIT COURT OF APPEALS HAS AGAIN IGNORED THIS COURT'S DIRECTIVE IN ALBEMARLE V. MOODY.

In Albemarle Paper Company v. Moody, et al, 95 S. Ct. 2362 (1975), this Court said in at least three separate parts of its opinion that District Court findings of fact should be given the deference to which they are entitled under Rule 52(a) of the Federal Rules of Civil Procedure.

More specifically, this Court stated at page 2373 that:

"The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases."

This case has proceded on for in excess of six years, and the District Judge has heard literally days of testimony, has reviewed hundreds of documents, seniority rosters, and other memoranda, and has listened to hours of oral argument and explanation, and it is submitted that the Court of Appeals, in its most recent opinion, has chosen to ignore the District Court's findings of fact and a majority of the panel has spent great time and trouble arguing with the findings of the District Court so that the end result of their opinion can be justified by the facts.

This is the essence of the reason for the rule giving great weight to the chancellor's findings of fact, and it is a dangerous practice to allow a court of appeals to arrive at its own unfettered conclusions to justify the ends it seeks.

Judge Widener grasped the problem brought before this Court in his dissent when he stated:

"So the crediting by the majority

> of testimony of representatives of the affected class that they had neither seen nor heard of the offer and its casting aside the perfectly well supported findings of fact by the district judge is quite beyond comprehension." (A-113)

In summary, the Court of Appeals' absolute failure to follow the rules required by Albemarle v. Moody with regard to the District Court's findings of fact, and the resulting strong and conflicting dissent, require a thorough review of this case to meet the ends of justice.

II. THE COURT OF APPEALS' DECISION TO DOVETAIL CONDUCTORS' SENIORITY BY DATE OF HIRE IS IN CONFLICT WITH PREVIOUS DECISIONS AND WITH OTHER CIRCUITS, WHERE THE GENERAL RULE IS THAT THE REMEDY TO CORRECT PAST DISCRIMINATION MUST NOT BE EQUALLY DISCRIMINATORY.

Historically, at the N & W Norfolk Terminal, there have been two conductors' rosters, one in the Barney Yard and one in the CT Yard, and they are made up on the basis of promotion date to the job of conductor. The District Court's Order on Remand merged the brakemen's rosters on the basis of date of hire, since that is the basis of the make-up of the brakemen's roster, merged the conductors' roster on the basis of date of promotion to conductor, since that is the basis for the make-up of the conductors' roster, and merged the car retarder operators' roster on the basis of date of promotion to car retarder operator, since that is the basis of the make-up for that roster.

Plaintiffs proposed that, despite the fact the conductors' roster is made up on the basis of promotion date, the conductors' roster be merged on the basis of date of hire. The plaintiffs stated that because of alleged greater promotional opportunities in the CT Yard, the existing conductors' rosters bear the marks of past discrimination, and that a dovetailing of the conductors' rosters based on conductor promotion date would carry forth the effects of past discrimination.

Judge Russell stated in the Court of Appeals' first decree:

> ". . . where discrimination violations of the Act have been found, the remedy granted must eliminate all residual effects of past discrimination to the greatest extent practical." (A-50).

The Court of Appeals disregarded the "greatest extent practical" and merged the conductors' roster in a manner different from which the rosters are made up. This method fails to realize that incumbent conductors from both yards have earned the status of conductor, and have been awarded with a seniority date as of the date of promotion as opposed to the automatic terminal-wide seniority given to brakemen by merely being hired. It is also interesting to note that plaintiffs and the Court of Appeals do not object to the car retarder operators' rosters being merged on the basis of date of promotion, since there are three times as many car retarder operators in the Barney Yard as there are in the CT Yard, the car retarder operator job being the highest paying and best job insofar as working conditions are concerned (A-I, 495a, 496a).

The order to merge the conductors' rosters on the basis of terminal seniority date runs squarely into the proposition that no one is entitled to super seniority under the Act. U.S. v. C & O, 471 F. 2d 582 (4th Cir. 1972); U.S. v. Bethlehem Steel Corp., 446 F. 2d 652 (2nd Cir. 1971); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

Furthermore, conductors, whether Barney Yard or CT Yard, will lose their rightful seniority as the result of the plaintiffs' proposal, and they should "not suffer displacement, lay-off or furlough merely to satisfy some court-imposed quota or black/white ratio." U.S. v. Jacksonville Terminal, 451 F. 2d 418 (5th Cir. 1971).

It is submitted that this Court should review this case because the Fourth Circuit Court of Appeals has contradicted itself, when the present case is compared to the C & O case. In the C & O decision, the Court of Appeals stated that the government's plan to avoid super seniority (i.e., that all brakemen on the conductors' roster, regardless of race, be ranked by the company seniority) was "unnecessarily sweeping, for if all brakemen are ranked by company seniority on the conductors' roster, certain general yard brakemen may be displaced by other general yard brakemen with more company but less conductor seniority." 471 F. 2d 582, at 590. This "unnecessarily sweeping" plan is precisely what the Court of Appeals has ordered in the instant case.

In the C & O case, the Court of Appeals stated:

> "Accordingly, on remand the District Court should modify its decree to provide that as between a Barney Yard brakeman and a General Yard brakeman or between two Barney Yard brakemen competing for a

> conductor's job, company seniority shall determine rank . . ." 471 F. 2d 582, at 590.

It is submitted that the District Court understood this language, and it recognized the sharp distinction between the language above and the proposal set forth by the plaintiffs as to the merger of conductor seniority rosters. Following the instructions in C & O, the District Court, in the instant case (A-II, 40), ordered that: "If two or more brakemen pass the conductors' test on the same day, they shall establish seniority on the conductors' roster in the order of their terminal seniority dates." The District Court's first decree in this case provided the same (A-26). Thus, the date of hire is used as a tiebreaker when a Barney Yard man and a CT Yard man compete, but it does not affect all conductors in both yards.

The District Court, in its remand opinion, stated that it had considered the C & O case in reaching its decision (A-60), and the District Court relied on Judge Russell's order that a merger of the rosters "would necessarily provide for the preservation of the rights of all incumbent employees at both yards and would permit no displacement of incumbent employees," and the Court relied on Judge Russell's further ruling on this very specific point that:

> "With particular reference to the right of Barney Yard brakemen to qualify for a promotion to conductor, any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this

higher classification, not give such brakemen higher or broader rights than those enjoyed or granted to CT Yard brakemen, who had qualified for promotion to conductor." 473 F. 2d 1349 (A-52).

Defendant Union submits that by the above statement Judge Russell predicted a problem with the loss of incumbent positions from the merger of the rosters, and specifically instructed the Court to avoid the super seniority problem or the displacement of incumbent employees. Despite that statement, the Court of Appeals, with a different panel, has now chosen to order displacement of incumbent employees. This is where the United States Supreme Court must lend its helping hand to those members of the innocent class of employees who will lose their contracted-for and hard-earned seniority standings on the conductors' roster because of a court-imposed quota.

The Fourth Circuit has had occasion to review another related case recently, styled Williams, et al v. Norfolk and Western Railway, No. 74-1549, _____ F. 2d _____, and Judge Widener mentioned the case in his dissent of the instant case. In Williams, Judge Fields' dissent noted: "One of the problems confronting the court in that case is the hypersensitive question of seniority . . .," and hypersensitive it is, as Circuit Judge Coleman so aptly stated in his dissent from the majority in U. S. v. Jacksonville Terminal, supra:

". . . are we going to eliminate that discrimination by destroying

> the seniority of those who for years, under contract, in good faith worked to earn it? That, to me, is substituting one form of discrimination for another."

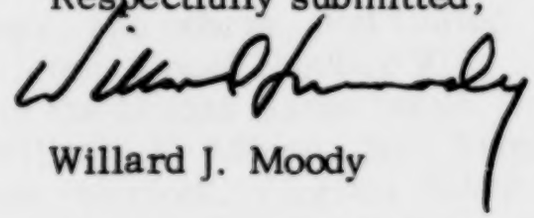
It is submitted, therefore, that the circuits are in conflict with regard to the issue of union seniority and its sanctity or lack of it. Further, this issue of seniority rights is a Federal question affecting not only the railroad industry, but others, and it is submitted that this Court should assume jurisdiction and decide this important Federal question once and for all.

The question that arises is: Does the Court possess the power, in shaping its remedy to correct wrongful discrimination, to punish innocent parties in order to allow the claimants to step into their "rightful place"? In this case, the sanctity of railroad seniority has been expressed innumerable times throughout the many days of trial. The fashioning of a remedy in the form of merging the conductor seniority rosters on the basis of date of hire with the company, will serve no other purpose than to frustrate the lives, livelihoods and plans of those who have relied upon their seniority rights over the past and presumably, in the future, and who have successfully passed the conductors' examination and stepped up to that grade with assurances that their seniority was protected.

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted for this Court to review the decision of the Fourth Circuit Court of Appeals.

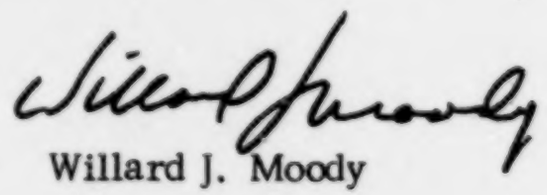
Respectfully submitted,



Willard J. Moody

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of United Transportation Union, Lodge Number 550 and United Transportation Union v. Robert Rock, Ezell B. Johnson, Russell C. Walker, and others, and United Transportation Union, Local Number 974, were deposited in the United States mails, first class, to William T. Mason, Jr., Esquire, 147 Granby Street, Norfolk, Virginia 23510; Jonathan Wallas, Esquire, 951 South Independence Boulevard, Charlotte, North Carolina 28202; Jack Greenburg, Esquire and Morris J. Baller, Esquire, 10 Columbus Circle, New York, New York 10019; James T. Turner, 1700 Virginia National Bank Building, Norfolk, Virginia 23510, counsel of record for respondents on the 9th day of January, 1976. It is further stated that the Petition has been served on all parties.



Willard J. Moody